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4 Attorney for Mguel Mendiola-Martinez  
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8 **UNITED STATES DISTRICT COURT**

9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 -----X  
12 UNITED STATES OF AMERICA, Case NO. 08 CR 1169-(WQH)  
13 :  
14 :  
15 Plaintiff, DEFENDANT'S REPLY TO THE  
16 :  
17 vs. GOVERNMENT'S MOTION IN LIMINE  
18 :  
19 TO PRECLUDE DEFENDANT'S ADMISSION  
20 :  
21 MIGUEL MENDIOLA-MARTINEZ OF EVIDENCE OF WORK PERMIT  
22 :  
23 AUTHORIZATION, AND OF WITNESSES IN  
24 :  
25 Defendant. TRIAL.  
26 :  
27 :  
28 DATE: September 15, 2008  
TIME: 2:00 p.m.  
PLACE: Courtroom 4  
-----X

25 To: United States Attorneys: Notice is hereby given that defendant,  
26 Miguel Mendiola Martinez, by and through his retained counsel, submits the  
27 following reply in opposition to the Government's motion in limine to  
28 prohibit the defendant's counsel from admitting material, relevant, and

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exculpatory evidence from the jury in the coming trial. Defendant has filed a Statement of Facts and a Memorandum of Points and Authorities in support of its position.

Respectfully Submitted, /s/ Genaro Lara

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September 2, 2008

## STATEMENT OF FACTS:

On March 17, 2008, Special Agent Matt Beals of the Bureau of Tobacco and Firearms and Customs Enforcement agents interviewed Mr. Mendiola-Martinez at his residence at 2873 Jenny Jade Court, in Valley Center, CA., where he resided with his lawful spouse, a United States citizen, and their two minor children born in the United States, and therefore also citizens of the United States. Mr. Mendiola-Martinez agreed to talk to the investigating officers. Luz Maria Mendiola, his wife, assisted in the interview by translating for her husband, whose command of the English language is limited.

Miguel Mendiola-Martinez fully cooperated with the investigating officers and admitted to possession of firearms, some of which he used for hunting. He showed the investigating officers a valid hunting license issued to his name on September 30, 2007 after he applied and a paid for the appropriate fee.

In the past, Miguel Mendiola-Martinez had retained the services of a licensed attorney at law by the name of Kevin Bove to assist him in his application for adjustment of status based on his marriage to a United States Citizen. Kevin Bove is a licensed attorney at law with offices located at 117 North Broadway, Escondido, CA. 92025. Kevin Bove assisted Mr. Miguel Mendiola-Martinez in the filing of various documents with the appropriate federal agencies and was successful in obtaining on July 27, 2007 a document entitled, "Employment Authorization Card". His able counsel Kevin Bove, also filed on April 2007, an

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2 application for waiver of grounds of inadmissibility, known as I-  
3 212, which is an application for permission to reapply for  
4 admission into the United States after deportation or removal.

5 The prosecution points out unnecessarily that the Employment  
6 Authorization Card is clearly labeled "not an entry document".

7 There is no

8 evidence that Mr. Miguel Mendiola-Martinez ever attempted to  
9 employ the Employment Authorization Card for purposes of entering  
10 into the United States.

11 On August 13, 2007 Mr. Mendiola-Martinez obtained a social  
12 security card issued to his name from the Social Security  
13 Administration, valid with his DHS authorization.

14 At the time of his arrest, Mr. Miguel Mendiola-Martinez was  
15 self-employed in various construction projects in the County of  
16 San Diego, thereby earning sufficient income to support his wife,  
17 and his two children, and to pay the mortgage to their home.  
18 Having followed his attorney Kevin Bove's advice to obtain his  
19 legal residency through lawful and legitimate ways, he had  
20 nothing to fear by discussing openly and candidly with the  
21 investigating officers on March 17, 2008. Mr. Miguel Mendiola  
22 Martinez believed in good faith that he had a right to work and  
23 to reside in the United States. This good faith and reasonable  
24 belief was based on the multiple documents he presented in his  
25 application for adjustment of status, the corresponding replies,  
26 his receipt of an Employment authorization card, his driver's  
27 license, and his reliance on his retained attorney, Kevin Bove's  
28 advice. He believed that that his reliance on the professional

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2 paid for advice to his attorney, and following all the orders  
3 from the federal agency which had accepted his immigration  
4 documents that  
5 he was dutifully complying with all requirements for his eventual  
6 right to reside permanently in the United States.

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8 MEMORANDUM OF POINTS AND AUTHORITIES

9 I

10 MIGUEL MENDIOLA-MARTINEZ SHOULD BE ALLOWED TO INTRODUCE THE  
11 EMPLOYMENT AUTHORIZATION CARD IN EVIDENCE AT HIS TRIAL TO SHOW  
12 THAT THE UNITED STATES  
13 GOVERNMENT, THROUGH DEPARTMENT OF HOMELAND SECURITY, APPROVED HIS  
14 APPLICATION FOR EMPLOYMENT, THEREBY ALLOWING HIM TO WORK IN THE  
15 UNITED STATES PENDING THE APPROVAL OF HIS PETITION FOR ADJUSTMENT  
16 OF STATUS.

17 Miguel Mendiola-Martinez having retained the services of an  
18 immigration attorney to assist him in the application process of  
19 becoming a legal resident, applied for a waiver of  
20 inadmissibility through application I-212. Thereafter, after  
21 paying a fee, he received from DHS, a valid Employment  
22 Authorization Card. He then obtained a valid social security  
23 card which is valid with DHS work authorization. There is no  
24 dispute but that the Employment Authorization Card, EAC, granted  
25 Miguel Mendiola-Martinez the right to work in any legitimate  
26 field of work in the United States. The recipient was reasonably  
27 led to believe by DHS and the issuing officers that he had the  
28 right to work and to remain in the United States pending the

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2 adjudication of his petition for adjustment of status based on  
3 his marriage to a United States citizen. If the EAC granted the  
4 right to work, as it did in this case, by implication it meant  
5 that the licensee had the right to work and to reside in the  
6 United States. The EAC, in and of itself, authorized Miguel  
7 Mendiola Martinez to work and to remain in the United States so  
8 long as the work authorization remained in effect. There is  
9 nothing in the record that would render his EAC permit null and  
10 void. At the time of his arrest, Miguel Mendiola-Martinez had not  
11 been notified by DHS that his work authorization had been  
12 revoked. To this day, there is no allegation that his work  
13 authorization is null and void, but it remains valid to the  
14 applicant to the present. He continues to work presently in  
15 construction thereby supporting his family, himself, and  
16 continues to make payments on the mortgage of their residence.

17 The alternative consequence sought by the prosecution would  
18 be to render the work permit a nullity, put Mr. Mendiola in  
19 prison, leave the family to  
20 fend for themselves, a woman and two minor children. The  
21 mortgagee would kick the family out on the streets and leave them  
22 homeless. the children would suffer the loss of their father,  
23 and the government would be forced to pay welfare and support the  
24 destitute minor children. By law, by reason, by logic, by  
25 common sense, that is not right; it is downright unjust. That is  
26 not what the Department of Homeland Security had in mind when it  
27 granted Mr. Miguel Mendiola-Martinez a right to work permit and,  
28 by implication, to remain in the United States pending the

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2 adjudication of his petition for adjustment of status. DHS knew  
3 Mr Miguel Mendiola-Martinez's immigration record and history  
4 By allowing his the right to work in the United States, it  
5 consented and condoned his residency. Not once did DHS ever  
6 filed an order ro show cause and set it before an immigration  
7 judge, an immigration procedure questioning his legal status in  
8 the United States. The United States government therefore, is  
9 estopped from using the instant prosecution to adjudicate Mr.  
10 Miguel Mendiola-Maratinez as an "illegal alien".

11 II THE UNITED STATES GOVERNMENT IS ESTOPPED TO ALLEGE THAT  
12 MIGUEL MENDIOLA-MARTINEZ IS AN ILLEGAL ALIEN AFTER DHS GRANTED  
13 HIM AN EAC AFTER HIS APPLICATION FOR ADJUSTMENT OF STATUS BASED  
14 ON HIS MARRIAGE TO A UNITED STATES CITIZEN. (DOCTRINE OF  
15 ENTRAPMENT BY ESTOPPEL).

16 The doctrine of entrapment by estoppel applies in the  
17 instant case when officials of the DHS issued an Employment  
18 Authorization Card to Mr. Miguel Mendiola-Martinez by which he  
19 was led to believe that he could work in the United States while  
20 his petition for adjustment of status was pending. Any  
21 reasonable person in the same or similar circumstances would be  
22 justified in believing that he had a right to work for himself or  
23 for others with that document issued from an official agency of  
24 the United States Government. Mr. Miguel Mendiola-Martinez was  
25 reasonable in his belief that he had a right to work and to  
26 reside in the United States with that document. U.S. v. Hsieh  
27 Hui Chen, 754

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4 F.2d 817, 825 (9<sup>th</sup> Cir.). cert denied, 471 U.S. 1139 (citing Cox  
5 v. Louisiana, 379 U.S. 559 (1965). U.S> v. Talmadge, 829 F.2d  
6 767, 773-775 (9<sup>th</sup> Cir.1987).

7 In U.S. v. Evans, 928 F.2d 858 (9<sup>th</sup> Cir. 1991), the Ninth Circuit  
8 held that the defense failed as a matter of law, but that, in the  
9 case before it, should be left to the jury.

10 This precise issue on these facts has not been presented for  
11 adjudication before. In the instant case, defendant proposes  
12 that the jury should be given a jury instruction to the effect  
13 that if DHS, an agency of the United States government, led  
14 Miguel Mendiola Martinez to believe that he had the right to  
15 remain in the United States by virtue of his application for  
16 adjustment of status based on his marriage to a United States  
17 citizen and on the issuance of a valid Employment Authorization  
18 card, then, he is not removable, and therefore, though he may not  
19 have been lawfully admitted into the United States, he is not an  
20 illegal alien, as defined by INS regulations.

21 The jury should be the proper body to make a factual  
22 determination on this crucial issue. The document entitled,  
23 "Employment Authorization Card", the defendant's driver's  
24 license, and social security card should also be admitted into  
25 evidence as they all are relevant documents upon which Mr. Miguel  
26 Mendiola-Martinez relied in good faith in his honest and  
27 reasonable belief that he was following the complex and byzantine  
28 immigration laws of the United States.



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III

IT IS AN OUTRAGEOUS, UNFAIR AND UNACCEPTABLE CONDUCT FOR THE UNITED STATES GOVERNMENT TO TAKE AWAY WITH THE LEFT HAND WHAT THE RIGHT HAND HAS GRANTED.

In the instant case the DHS (Department of Homeland Security) has granted a valid work authorization card to Miguel Mendiola Martinez. The DHS is an official agency of the United States government. Miguel Mendiola, relying in good faith on the interpretation of his retained counsel, Kevin Bove, paid all processing fees and filed all the required documents for him to obtain a valid work authorization card. The right hand that granted this document surely considered all relevant facts in the process of either approving or denying such document. Because of his excellent work record, lack of criminal history, his marriage to a United States citizen, his good health, and likelihood of obtaining his right to permanently reside in the United States, DHS sought fit to grant him the Employment Authorization Card. By implication, DHS pardoned his illegal entry into the United States in 1999. Another equally reasonable interpretation of the procedure followed by Mr. Miguel Mendiola-Martinez vis a vis DHS, would be that DHS, in granting the applicant a work authorization card, thereby waived removal, and should now be estopped from arguing that the accused is an "illegal alien".

The left hand, on the other hand, now seeks to erase what

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the right hand did, and denies that the work authorization permit granted any rights to the accused, ignoring the steps that Mr. Mendiola-Martinez took to complete each and every step in becoming a legal resident. Mr. Mendiola applied for and obtained social security card, California driver's license, hunting license, and continued to be gainfully sel-employed thereby supporting his family.

IT would be ignominious and not worthy of its honor and integrity for any country to behave toward its governed in such a way that it gives the appearance of unfairness and deceitfulness. At the very least the jury should be informed of every possible step Mr. Miguel Mendiola-Martinez took in retaining professional help, in paying any fees asked for in the application process and what documents he was given as a result of those applications.

## IV

THE UNITED STATES GOVERNMENT HAS INTRODUCED INFLAMMATORY AND PREJUDICIAL REFERENCES TO OSAMA BIN LADEN, IN EFFORTS TO PREJUDICE THE COURT AND THE JURY AGAINST THE ACCUSED. THE COURT SHOULD ADMONISH THE PROSECUTION FROM MAKING ANY REFERENCES TO THAT WORLD TERRORIST AND TO ASSOCIATE HIM WITH THE ACCUSED.

The government's reference to Osama Bin Laden, the world's most wanted terrorist, is uncalled for. The obvious linkage of that despicable character to Mr. Miguel Mendiola Martinez, who happens to be dark skinned, a foreigner, is stooping low for the dignity of a federal prosecutor. Such a

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2 reference in a jury trial is highly prejudicial to the accused.  
3 Defendant respectfully requests the court to admonish the  
4 prosecutor from referring in any way to that evil, despicable  
5 character. The defendant is entitled to a fair, unbiased  
6 prosecutor who relies on the law of the land and not on name  
7 calling, and certainly on guilt by association.

8 V.

9 MIGUEL MENDIOLA-MARTINEZ IS NOT AN "ILLEGAL ALIEN" FOR PURPOSES  
10 OF 18 U.S.C.922(g)(5)

11 The drafters of the statute under which the government is  
12 prosecuting Miguel Mendiola-Martinez intended to borrow  
13 immigration terms when they used the language, "possession of a  
14 firearm by a person illegally, or unlawfully in the United  
15 States". The mere physical presence of a person in the United  
16 States does not per se satisfy the element of the crime of being  
17 in the United States illegally or unlawfully. Any  
18 interpretation to the contrary is legally indefensible. United  
19 States of America v. Antonio Lopez Perera, 438 F.3d 932 (9<sup>th</sup> Cir.  
20 2006).

21 The crucial definition of what constitutes being, "illegally  
22 or unlawfully in the United States" is not contained in 18 U.S.C.  
23 922(g)(5).

24 The BATF, Bureau of Alcohol, Tobacco and Firearms, the agency  
25 charged with administering section 922 promulgated a definition  
26 which had been adopted from regulations enacted by Immigration  
27 and Naturalization Service, (INS). BATF  
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3 interpretation of what is an "illegal alien" must be therefore  
4 construed in  
5 light of immigration laws.

6 However, the adoption of INS regulation by BATF, did not  
7 define the term, "entered". "In the context of immigration law,  
8 however, "'enter'" is "'a specific legal term". "Entering the  
9 United States requires:

10 (1) crossing into the territorial limits of the United States,  
11 i.e. physical presence; (2)(a) inspection and admission by an  
12 immigration officer, or (b) actual and intentional evasion of the  
13 inspection at the nearest inspection point; and (3) freedom from  
14 official restraint." U.S. v. Perera, 438 F.3d, 935.

15 In the instant case, Miguel Mendiola-Martinez has been  
16 subject to the official restraints imposed by DHS through the  
17 Employment Authorization Documents. BY virtue of the EAC.,  
18 Miguel Mendiola Martinez is prohibited by DHS from using the  
19 document to enter into the United States, thereby his right to  
20 travel to Mexico or to any other countries has been restricted  
21 and limited by the regulation. In essence, Miguel Mendiola  
22 Martinez is subject to the official restraint by DHS, and he has  
23 therefore, " not entered" the

24 United States. If he has not entered the United States without  
25 official restraints on his freedom, then, he is not an illegal  
26 alien within the definition adopted from INS by BATF. (See also  
27 United Statesv. Lomera Valdovinos, 429 F.3d 927 (9<sup>th</sup> Cir. 2005).  
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VI

THE DEFENDANT INTENDS TO CALL WITNESSES ON HIS BEHALF:

KEVIN BOVE, HIS FORMER IMMIGRATION ATTORNEY AS AN EXPERT, BILL  
LYONS, CHARACTER WITNESS, LUZ MARIA MENDIOLA, DEFENDANT'S WIFE,  
AND PASTOR PEDRO MENDIOLA.

Respectfully Submitted,

/s/ \_\_\_\_\_

Genaro Lara, for Miguel Mendiola-Martinez

September 2, 2008

Declaration of Counsel

The undersigned, declarant, Genaro Lara, states under penalty of perjury as follows:

1. I am one of the retained counsel on behalf of the accused, Miguel-Mendiola Martinez

2. I am licensed to practice in the State of California and my license is in good standing with the State Bar of California and with the United States District Court for the Southern District of California.

3. September 2, 2008, I e-mailed to the Assistant U.S. Attorney a copy of the above entitled response to the prosecution's motion to exclude evidence to: Christina.McCall@us.doj.gov

4. On September 2, 2008, I filed electronically the above document.

I certify the above to be true to the best of my knowledge and belief.

/S/\_\_\_\_\_ (Genaro Lara)

Genaro Lara

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Dated: September 2, 2008

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)	CASE NO 08-CR-1169
	)	(W.Q. H)
Plaintiff,	)	
	)	
vs.	)	Certificate of Service
	)	
MIGUEL MENDIOLA-MARTINEZ,	)	
	)	
Defendant	)	

IT IS HEREBY CERTIFIED THAT:

I, Genaro Lara, am a Citizen of the United States, and am at least 18 years of age. My business address is 121 Broadway, Suite 365, San Diego, CA 92101.

I am not a party to the above action. I have caused service of the Response to the Prosecution's motion in limine to exclude evidence, on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF system, which electronically notifies them.

1. Christina McCall, Attorney for the United States of America.

I declare under penalty of perjury that the above is true and correct.

Executed this 2<sup>nd</sup> day of September 2008

/S/ Genaro Lara

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Genaro Lara

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